JOHORE REPORTS

[ORIGINAL CIVIL JURISDICTION]

MILLS, J.

January 12, 1935.

KHOO CHEONG PUAY ..... Plaintiff.

vs.

THE OVERSEA CHINESE BANKING CORPORATION LTD., & ORS. ..... Defendants.

[JOHORE CIVIL SUIT No. 29 of 1934]

Executors—power of sale over testator's immoveable property—construction of Will as to absence of restriction on executor's powers—whether permission of Court necessary before alienation—Probate and Administration Enactment, 1915, S. 83 (ii)—Claim to set aside Transfer for gross undervalue—Consideration of principles applicable—Suit by cestui que trust *against third parties in respect of trust property—circumstances under which Suit maintainable—Probate and Administration Enactment, 1915, S. 83 (iv)—Deposit of title deeds by way of security—whether a caveatable interest—The Land Enactment, 1910, S. 50.*

A testator and his partner, the co-owners of certain lands in Johore, deposited the Grants relating to the lands with a bank to secure the overdraft of their partnership business with the bank. Shortly after the testator's death the bank entered a caveat against the lands claiming an interest by virtue of the deposit of the Grants. Later on, the executors of the testator's Will (who had not yet obtained Probate) and the surviving co-owner entered into an agreement for the sale of the lands to the bank for $50,000/- such sum to be set-off against the amount due on the overdraft. In due course the executors obtained Probate and thereupon a transfer of the lands to the bank was completed and registered by the Commissioner of Lands and Mines nearly 2 years after the agreement for sale. The bank sold the lands to a foreign Company shortly after registration of their transfer at a very much higher price but before the transfer to the Company could be registered (as there were alleged difficulties in the way of the due registration of the Company). the plaintiff, who was a residuary legatee under the Will. lodged a caveat and sued the bank to set aside the first transfer, firstly on the ground that the executors had no power to sell without an Order of Court, and secondly, on the ground of fraud in that the sale to the bank was at a gross undervalue. The plaintiff also sued the executors for an order for general administration of the testator's estate. In the course of the suit the Company was joined as a defendant on its own application, and counterclaimed for registration of its transfer.

Held, on the true construction of the Will, that it contained no restriction on the executors' power of sale over the testator's immoveable property and that accordingly the executors could sell without an Order of Court.

Held also, that in contracting to sell the lands to the bank, the executors acted as executors and not as trustees, as they had not then completed their duties as executors, and that, as such, they were not restricted in dealing with the lands by the trusts of effecting a settlement of the estate property.

Held also, that in order to set aside a sale on the ground of gross undervalue, such undervalue must at the date of the contract of sale be sufficiently gross to be in itself conclusive and decisive evidence of fraud, and there was no such evidence in this case.

Held also, that a beneficiary under a Will is "a person interested in the property ' within the meaning of Section 83 (iv) of the Probate and Administration Enactment, 1915.

Held further, that a suit by a *cestui que trust* against third parties to set aside any transaction affecting the trust property is maintainable, if the trustees (who by virtue of their office should ordinarily sue in such case) are themselves precluded by their own acts and conduct from prosecuting the action against such third parties, and are made parties to the suit.

Held also, that a deposit of Grants of land as security for a loan confers a sufficient interest in the land to entitle the depositee to register a caveat against the land under section 50 of The Land Enactment, 1910.

Action tried before Mills, J. on the 21st, and 22nd days of November 1934, the 9th, 10th and 11th days of December 1934 and the 5th and 6th days of January 1935. The material facts of the case are set out at the beginning of the judgment reported hereunder.

Cobbett (W. F. Zehnder with him) for the Plaintiff.

Koek for the 1st Defendant bank

Mundell for the 5th Defendant Company.

Khoo Cheong Leng, the 3rd Defendant in person.

Cur. Ad. Vult.

MILLS, J.—The Plaintiff is a residuary devisee and legatee under the will of Khoo Giong Hong, deceased, whom I will call "the testator."

The second, third and fourth defendants are executors and trustees of the will.

The first defendant, whom I will call "the Bank," is the proprietor of certain lands, which I will call "the land," transferred to them by the executors.

The fifth defendant, whom I will call "the Company," is a *bona fide* purchaser of the land from the Bank without notice of any defect in the title of the Bank.

The testator and his partner, Teo Soon Chor, had, at some time before the testator's death, deposited their titles to the land with the Bank, to secure the indebtedness of the partnership business, Chop Chee Tiong Seng.

The testator died on the 17th April, 1932.

On the 5th May, 1932, the Commissioner of Lands and Mines registered a caveat against the land, lodged by the Bank.

On the 5th July, 1932, the executors, who had not then obtained a grant of probate, contracted to sell the land to the Bank for $50,000.00.

On the 6th June, 1934, a transfer from the executors (who had now extracted their grant) to the Bank was registered by the Commissioner,

On the 21st June, 1934, the caveat lodged by the Bank was removed.

On the 27th June, 1934, the Bank agreed to sell the land to the Company for $204,560.64: on a subsequent date the Company performed their part of the agreement.

On the 18th August, 1934, the Commissioner refused to register the transfer, on the ground that the Company had not complied with the Foreign Companies Enactment.

On the 23rd August, 1934, the Commissioner registered a caveat lodged by the Company.

On the 30th August, 1934, the Registrar of Foreign Companies certified that the Company had complied with the Foreign Companies Enactment.

On the 1st September, 1934, the Commissioner registered a caveat lodged by the plaintiff.

The transfer from the Bank to the Company remains unregistered.

The plaintiff claims as against the Bank

(1) that the transfer from the executors to the Bank be set aside.

(2) that the transfer should be expunged from the Register of Titles

or, alternatively,

(3) that the Bank be ordered to account to the plaintiff for all profits which they made or might have made on the re-sale of the land.

The plaintiff claims as against the defendant executors, general administration of the testator's estate.

The plaintiff makes no claim for relief against the Company.

The first defendant contends that the Bank acquired a good title from the executors.

The second and fourth defendants have not appeared.

The third defendant consents to an order for general administration.

The fifth defendant contends that the Company acquired a good title from the Bank; and counter-claims for

(1) an order that the plaintiff's caveat be expunged from the Register of Titles.

(2) registration of the transfer from the Bank to the Company.

The plaintiff's claim is based on two contentions

(1) the transfer from the executors to the Bank is void because the will restricts the power of disposition and the executors did not obtain the permission of the Court (The Probate and Administration Enactment, 1915, section 83 (ii)),

(2) the transfer was made at such a gross under-valuation that the transaction was fraudulent.

As to the first contention, section 83 (ii) of the Probate and Administration Enactment, 1915, reads as follows:—

> "The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him, by an Order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order."

It is necessary to consider, then, whether the executors' power of disposal is subject to any restriction imposed in this behalf by the testator's will.

Counsel for the plaintiff argued that the will did impose a restriction on the executors' right to dispose of the land: the argument was as follows:—

The will does not expressly or impliedly give any power of sale to the executors:

On the contrary, the whole of the property is to form part of the Reserved Estate, and the Reserved Estate is expressly devised and bequeathed to Trustees for a specific purpose:

Though the Reserved Estate may in fact be liable for debts, yet the conclusion is that the testator intended to prevent the executors from disposing of the estate, and the Court should construe the will as containing this intention:

The case of *A. N. Kenion* (6 F.M.S. Law Reports, p. 1) is distinguishable because there the will contained the expression "after the payment of my just debts and funeral expenses...."

Counsel for the Bank and for the Company argued that the will did not impose any restriction on the executors' right to dispose of the land: the arguments were as follows:—

The will must be construed reasonably.

It contains no express restriction on the executors' power of disposition.

An express power of sale is given to trustees:

The trust of investment does not apply to the property (but to the proceeds of sale of the property), so that the direction for investment constitutes no restriction on the power of sale:

The trust for investment must be held to apply only to such proceeds as are available for investment:

The executors must pay debts, and the trust for investment can only apply to such proceeds as remain after the debts have been paid:

The trust does not apply to land which has been sold:

The executors sold land *qua* executors, and the trust has not yet commenced to operate:

A. N. Kenion's case (*ubi supra*) is an authority for the proposition that a devise to trustees does not constitute a restriction.

In my opinion, the correct position is as follows:—

(i) The executors do not become trustees in respect of the land until they cease to be executors:

(ii) They do not cease to be executors until they have performed all the executors' duties:

(iii) On the 5th July 1932, they had not performed all the executors' duties, because, *inter alia*, they had not paid the stamp duty, extracted the grant of probate, or obtained transmission of the land to themselves.

I hold, therefore, that on the 5th July, 1932, the executors acted as executors and not as trustees, and that they were not bound by any restriction imposed by the will on the trustees' power to dispose of the land or its proceeds.

Whether or not my reasoning is correct, I am fortified in my conclusion by the decision in the case of *A. N. Kenion* (*ubi supra*): it is true that in that case the will read "after the payment of my just debts and funeral expenses I give and devise.....": but in my opinion it can make no difference whether the direction to pay debts is expressly stated in the will as in that case, or whether it is expressly stated in the law, as in Johore.

Further if one attempts to elucidate the testator's intention from the provisions of the will as a whole, I do not think that there is sufficient ground for holding that the testator impliedly intended to restrict the executors' power by reason of the fact that he gave his whole estate in trust to trustees.

In my opinion the will is not drawn up with such care and precision as would justify the Court in concluding, by implication, that such was the testator's intention.

In terms, the will is contradictory: clause 14 would, if construed strictly, cancel the direction for the payment of legacies; and the description of all the testator's property as "residuary estate" is a misnomer.

As to the first contention, then, I hold that the will did not impose any restriction on the executors' power to dispose of the land, and consequently that it was not necessary for the executors to obtain permission of the Court before disposing of it.

And in so far as the contract is attacked on the ground that the permission of the Court was not obtained, I hold that the attack fails and that the contract is a valid contract.

I should add that even if the permission of the Court ought to have been obtained, the disposal is not void but merely voidable; see section 33 (iii) of the Enactment: and in my opinion the Court, if asked to set it aside, would be bound to apply the principles which ought to be applied, when the Court is asked to set aside a contract.

I am aware that the plaintiff here seeks to set aside the transfer and not the contract: but I do not consider the difference material, since the contract and the transfer are, as regards the contractual obligations of the parties, part and parcel of the same transaction, and the transfer is merely a method of carrying out the contract.

The plaintiff seems to realize that the contract and the transfer are bound up together, because in paragraph 18 of the Plaint he pleads that the Bank committed fraud in accepting the transfer, and when giving particulars of the fraud he says "The Bank.....purchased..... the said lands..... Such purchase was at a gross undervalue": in fact, the "purchase" was effected when the contract of the 5th July, 1932, was executed.

It appears to me that in the present case the Court should refuse to set aside the contract or transfer, if only for the reason that the rights of Teo Soon Chor would be affected, and he is not a party to this suit.

As to the second contention, the plaintiff seeks to prove that the transfer of the land by the executors to the Bank for $50,000 was a transfer at such a gross under-valuation as to be in itself conclusive and decisive evidence of fraud.

And he argues that the crucial date at which the land ought to be valued is some date not before the earliest date on which the executors, having extracted the grant of probate, could have obtained from the Court an order permitting the sale of the land, i.e. not before 20th May, 1934.

I cannot agree with this argument.

I have held that on the 5th July, 1932, the executors made a valid contract to sell the land to the Bank for $50,000.

I hold that they are bound by that contract, and that the date which must be taken as the date for valuation is the date when that contract was made, namely, the 5th July, 1932.

I hold that, if the plaintiff is to succeed on the allegation of fraud, he must prove that on the 5th July, 1932, the consideration of $50,000 was such a gross under-valuation as to be in itself conclusive and decisive evidence of fraud.

What evidence does the plaintiff adduce in order to substantiate this allegation?

There is only the evidence of the plaintiff himself; my note reads as follows:—

"I value the estate, in July, 1932, at between $300 and $400 an acre—for about 640 acres: (between $192,000 and $256,000 J.V.M.)—over $180,000.

In July, 1934, when I visited the land, I was accompanied by my friends, and they told me the value."

Now the value of a rubber plantation, like the speed of a motor car, is a matter of fact: but in both cases, in the absence of standards for calculating that value or speed, recourse must be had to opinion.

The only opinion which the Court is permitted to receive on such a point as this is the opinion of an expert.

The Plaintiff does not purport to be an expert: so the Court cannot receive his opinion as evidence.

Hence the plaintiff has adduced no admissible evidence in support of his allegation of under-valuation.

That concludes the matter.

But I may say that if I am permitted to accept the opinion of non-experts, I should not hesitate to reject the opinion of the plaintiff in favour of the opinion given by Teo Soon Chor, a business man, and Cheong Hock Chye, an expert valuer.

I accept the contract price of $204,000 odd as being a fair value for the land on the 27th June, 1934: and that being so, the minimum figure of $192,000 given by the plaintiff as the value in July, 1932, is palpably absurd.

Teo Soon Chor says that rubber land was valueless in 1932, and Cheong Hock Chye says that there was no market for rubber estates in 1932.

It is common knowledge that the price of rubber land was very low in 1932 before the anticipation of rubber restriction commenced to raise prices, and that large areas were being left untapped.

It is true that Cheong Hock Chye was unable to give a formula for his valuation, but as a professional valuer and auctioneer he would be in a position to know what would-be purchasers would be willing to offer, and this might well be a better criterion than a theoretical valuation based on an estimate of future crops, production-costs, and commodity prices which nobody can accurately foretell.

Cheong Hock Chye valued the land as in July, 1932, at about $42,000.

As to the second contention, then, I hold that the plaintiff has failed to prove that the executors disposed of the land at a gross under-valuation.

And in so far as the contract is attacked on the ground that the land was disposed of at an under-valuation, I hold that the attack fails and that the contract is a valid contract.

By the terms of that contract, the executors were under a legal obligation to transfer the land to the Bank.

They executed a transfer accordingly, and I hold that this was a valid transfer.

It follows that the executors gave a good title to the Bank.

I hold that the Bank could give, and did give, a good title to the Company.

The plaintiff is not entitled to any of the reliefs which he claims against the Bank; nor, as against the defendants, is he entitled to general administration of the estate, because, although the third defendant consents, I hold that the plaintiff has failed to prove his case against the second and fourth defendants who have not consented.

As to the counter-claim by the Company, I hold that they are entitled to an order that the plaintiff's caveat be removed and that the transfer from the Bank to the Company be registered, and I order accordingly.

As to costs.

The plaintiff must pay the costs of the four original defendants: he must also pay the costs of the Company, because his claim to relief affected the rights acquired by the Company by virtue of their contract with the Bank, and it was necessary that the Company should be added as a defendant in order that they might be heard and might be bound by the Order of Court.

The plaintiff must also pay, as part of the costs in the cause, the costs incurred in connection with the application by Summons in Chambers that the Company should be added as a defendant.

There are a few incidental matters to which I may refer.

(1) The Plaintiff maintained that the contract of the 5th July, 1932, was conditional on the permission of the Court being obtained: I hold that it was not conditional, since it contains the expression "if the said sale shall require the sanction or approval of the Court in Johore," and I have held that the permission of the Court was not necessary.

(2) The allegation of fraud contained in paragraph 18, clause (a), of the plaint, was abandoned by the plaintiff during the trial.

(3) Counsel for the plaintiff argued, during the course of the hearing, that the Bank had connived at a breach of

trust by the executors: I have held that the trust did not commence to operate; apart from that, however, I have not taken the point into consideration as it was not pleaded in the plaint.

(4) Counsel for the plaintiff argued, during the hearing, that a conspiracy between the Bank and Teo Soon Chor was proved by the fact that, two years after the executors sold the land, the Bank gave Teo Soon Chor an honorarium of $10,000, which was out of the proportion to the past services which he had rendered in supervising the land: I do not consider that the Court is justified in concluding that there was a conspiracy; since the Bank, *inter alia*, forgave Chop Chee Tiong Seng the sum of some $26,000, without any consideration whatever.

(5) Counsel for the plaintiff argued, during the hearing, that the sale by the executors to the Bank amounted to an unlawful preference given to one creditor over the others, and therefore the Court ought not to countenance it: on that point my view is that since this alleged irregularity was not mentioned in the plaint, the Court ought not to adjudicate on the matter.

(6) Counsel for the Bank raised several questions connected with official acts performed in the Office of the Commissioner of Lands and Mines: it is impossible for me, without having heard the Commissioner, to say that he took a wrong view of his duties, but there are two matters regarding which I can hold that his views were correct: in the first place, I hold that he was right in considering that notice to the Registrar of Foreign Companies is not notice to the Commissioner of Lands and Mines, although the same person may be performing the duties of both appointments: in the second place, I hold that he was right in registering more than one caveat against the same lands.

(7) During the hearing of the case, I was called upon to decide two preliminary points of law.

The first point was whether a beneficiary under the will is a "person interested in the property" within the meaning of section 83 (iv) of the Probate and Administration Enactment, 1915: I hold that he is: it was admitted that he may rightly be said to be "interested in the estate;" and my decision does not extend or vary his interest, but confines it to an interest in the property which is alleged to have been wrongfully disposed of: this being an administration action, the case of *Tan Joo Hern and another* v. *The Sze Hai Tong Banking & Insurance Co., Ltd., and others* (3 Malayan Law Journal, p.127) is distinguishable. The second point was whether a beneficiary under the will has any *locus standi* to prosecute an action in which the protagonist should ordinarily be the executor: I hold that he has: I take the law as laid down by the Privy Council in 1886, "When an executor cannot sue, because his own acts and conduct, with reference to the testator's estate, are impeached, relief, which (as against a stranger) could be sought by the executor alone, may be obtained at the suit of a party beneficially interested in the proper performance of his duty" *Beningfield* v. *Baxter*, 12 Appeal Cases, at p. 178: it was argued that the law is correctly laid down in *Halsbury's* Laws of England, Volume 28, page 172, paragraph 350, but it seemed to me that that paragraph is inapplicable since it is there assumed that the executor can sue, whereas in the present case the executor cannot sue because his own acts and conduct, with reference to the testator's estate, are impeached.

(8) Counsel for the Company intimated to me that it would be helpful to the commercial community if I indicated my opinion as to whether a deposit of title-deeds as security for a loan creates a caveatable interest in Johore:

my opinion is that if it is proved by a deposit of title-deeds or in any other manner that one person promises, impliedly or expressly, to charge his land to another, then that other has such an "interest" as will justify him in lodging a caveat: in so far as there may be an express promise, my opinion follows the decision of Innes, C.J., in Selangor Civil Suit 292/08: I think that the words "or otherwise howso-

ever" are so wide and comprehensive that the smallest or the remotest interest in land will enable a caveat to be lodged, and that the Commissioner has no discretion to refuse to register it if the caveator shows such interest: in the present case the Bank lodged a caveat on the 5th May, 1932, by virtue of a deposit of title-deeds deposited as security for a loan: I hold that this caveat was rightly registered by the Commissioner.

Finally, in case any further point arises in connection with this case, I give all parties liberty to apply.

Judgment accordingly.

Solicitors for the Plaintiff—*Zehnder Bros.*

Solicitors for the 1st Defendant Bank—*Chan & Eber.*

Solicitors for the 5th Defendant Company—*Sisson & Delay.*